



MELINDA S. GENTILE

2019 Legislative Changes Affecting the Construction Industry

This article was co-authored by Melinda S. Gentile, Partner, Peckar & Abramson, P.C., Miami and Cadian T. Baker, Paralegal, Peckar & Abramson, P.C., Miami.

The 2019 Florida Legislative Session recently concluded and a number of important construction-related House Bills (HB) and Senate Bills (SB) were presented during the Session. Below is a summary of those construction-related bills set to become law in 2019.

For More Information Please Contact

Melinda S. Gentile
mgentile@pecklaw.com
 305.358.2600

Bills Becoming Law in 2019

HB 1247: Relating to Construction Bonds. This bill passed both the House and the Senate and is awaiting the Governor's signature. Once the Governor has approved the bill it becomes effective as of October 1, 2019.

This bill addresses how to properly perfect a claim against a contractor's payment bond.

(1) The Notice of Nonpayment that must be served on the contractor and the surety, must be made under oath and include the following provisions:

- The nature of the labor or services performed or to be performed;
- The materials furnished or to be furnished;
- The amount paid on the account; and if known, the amount owed and the amount to become due.
- A Notice of Nonpayment that includes the sums for retainage must specify the portion of the amount claimed for retainage

(2) A subcontractor, laborer, or material supplier (claimant) who files a fraudulent Notice of Nonpayment loses their rights under the bond. The filing of a fraudulent notice is a complete defense to claimant's claim against the bond. A notice is fraudulent if the claimant willfully exaggerated the amount due, willfully included a claim for work not performed or materials not furnished or prepared the notice with willful and gross negligence, which resulted in willful exaggeration. However, a minor mistake in the notice, or a good faith dispute as to the amount due, is not considered fraudulent. Please note that this provision mirrors the existing statute relative to a fraudulent lien.

(3) The negligent inclusion or omission of any information in the Notice of Nonpayment that has not prejudiced the contractor or surety does not defeat a valid bond claim.

(4) The timeframe for service of a Notice of Nonpayment for rental equipment is modified. The notice may not be served later than 90 days after the date that the rental equipment was on the job site and available for use. Prior to this modification Florida Statute 713.23 (1) (d) provided that the notice may not be served after 90 days following the date the rental equipment was on the job site and available for use.

(5) Contractors are entitled to recovery of attorney's fees under Florida Statute 627.428 when obtaining a judgment against an insurer for failing to make a payment under a payment or performance bond. Please note that this amendment to F.S. 627.428 only applies to payment or performance bonds issued on or after October 1, 2019.

(6) The bill provides a statutory form for the Notice of Nonpayment.

HB 127: Relating to Permit Fee Transparency. This bill passed both the House and the Senate and is awaiting the Governor's signature.

This bill requires that local governments (counties and municipalities) with a building department, post permit and inspection fee schedules on their website in an area easy to access by July 1, 2019. In addition, building permit inspection utilization reports must be posted on the local government website by December 31, 2020. After December 31, 2020 local governments providing a schedule of fees must update their building permit and inspection utilization reports on their website before adjusting the fee schedule.

The utilization report must include the following information:

- Number of building permit applications submitted
- Number of building permits issued or approved
- Number of building inspections and reinspections requested
- Number of building inspections and reinspections conducted
- Number of building inspections conducted by a private provider
- Number of audits conducted by the local government of private provider building inspections
- Number of personnel dedicated by the local government to enforce the Florida building Code, issue building permits, and conduct inspections.
- Direct and indirect cost incurred by the local government to enforce the Florida Building Code ("FBC"), including, but not limited to, building department salaries and related overhead
- Budget surplus, revenue information and sources

HB 207: Relating to Impact Fees. This bill passed both the House and the Senate and is awaiting the Governor's signature.

This bill prohibits any local government from requiring the payment of impact fees prior to the issuance of a building permit. Impact fees are amounts imposed by local governments to fund local infrastructure needed to expand local services to meet the demands of population growth caused by development.

The bill requires that impact fees must satisfy the dual rational nexus test, which requires that the impact fee have a reasonable connection, or rational nexus between: (1) the proposed new development and the need and the impact of additional capital facilities; and, (2) the expenditure of revenues generated, and the benefits accruing to the new residential or commercial construction.

Local governments will be required to earmark funds collected by the impact fees for capital facilities that benefit new users. Impact fees may not be used to pay existing debt or pay for prior approved projects unless the expenditure meets the rational nexus test.

The bill excludes fees imposed for connection to water or sewer service from being treated as impact fees.

HB 447: Relating to Building Permits and Construction. This bill passed both the House and the Senate and is awaiting the Governor's signature.

The purpose behind the legislation is to ensure that when residential property exchanges hands, the new owners are free of lingering and open or expired permits tied to the property.

(1) This bill provides that local governments:

- May send a 30-day written notice to the owner and contractor listed on the building permit that the permit is going to expire.
- May close a building permit 6 years after the issuance, even in the absence of a final inspection if the local enforcement agency determines that there are no apparent safety hazards.
- May only charge a person one search fee for identifying the building permits for units or sub-units assigned to one parcel of property.
- Must close a permit in compliance with the building code that was in effect when the building department received the permit application regardless of whether the permit has expired.
- May not penalize an arms-length purchaser of property because a previous owner failed to close a building permit for the property.
- May not deny issuance of a building permit to a contractor solely because the contractor is listed on other building permits that were not closed.

(2) This bill also provides that a contractor who takes over a job from a previous contractor is not liable for any defects in the work performed by the previous contractor.

(3) The bill eliminates the requirement of an owner-builder to occupy a residential property, which they are either building or improving, for at least one (1) year after the completion of the project if:

- The owner is closing a permit where the contractor substantially completed the work related to the permit;
- The residential property is a one-family or two-family dwelling, townhome, accessory structure (gazebo, picnic pavilion, boathouse, shed, etc.) to the residential property, or an individual residential condominium unit or cooperative unit.
- The property owner obtains the local government's approval prior to qualifying under the owner-builder exemption.

(4) The bill amends F.S. 553.73 (7) (a), to include the following: “Every 3 years, the commission may approve updates to the Florida Building Code without a finding that the updates are needed in order to accommodate the specific needs of the state.”

(5) The bill amends F.S. 558.00

HB 7071: Related to Workforce Education Preapprenticeship and Apprenticeship Programs. This bill passed both the House and the Senate and is awaiting the Governor’s signature.

This bill is written to create, increase, and maintain a skilled workforce in Florida.

This bill creates the Florida Pathways to Career Opportunities Grant program to provide grants to high schools, career centers, charter technical career centers, Florida College System institutions, and other organizations authorized to sponsor apprenticeship and preapprenticeship programs.

It creates the Career and Technical Education Graduation Pathway (“CTE”). This pathway allows for students to take career and technical education courses in high school if they wish to pursue a career directly after graduation. Each School Board must incorporate this graduation via CTE option into their student progression plan offerings.

In addition, it requires that the Department of Business and Professional Regulation, in consultation with the Department of Education, submit a report by December 31, 2019, regarding the apprenticeship programs that could substitute for the educational and experience training otherwise required for licensure.

HB 337: Related to the Courts and the Amounts in Controversy in Civil Cases. This bill has passed both the House and the Senate and is awaiting the Governor’s signature.

Beginning January 1, 2020, county courts shall have original jurisdiction of all actions at law in which the amount in controversy does not exceed the sum of \$30,000, exclusive of interest, costs, and attorney’s fees. Beginning on January 1, 2023, county courts shall have original jurisdiction of all actions at law in which the amount in controversy does not exceed the sum of \$50,000, exclusive of interest, costs, and attorney’s fees. This change applies to all causes of action filed on or after the specified dates, regardless of when the cause of action accrued.

The bill also provides that a county court case with an amount in controversy exceeding \$15,000 shall be appealed to the district court of appeal and not the circuit court. This provision of the bill is repealed on January 1, 2023.

HB 91: Related to Judicial Process and the Notice of Lis Pendens. This bill passed both the House and the Senate and is awaiting the Governor’s signature. Once the Governor has approved the bill, it becomes effective immediately.

This bill amends F.S. 48.23, providing that the recordation of a Notice of Lis Pendens precludes the attachment of liens or other interest on a foreclosed property until after the recording of an instrument transferring title pursuant to a judicial sale, unless the Lis Pendens expires, is withdrawn, or is discharged.

The bill also addresses service of process:

- Authorizes special process servers appointed by the sheriff and certified process servers to serve any nonenforceable civil process, such as a Writ of Garnishment;
- Authorizes substitute service on a spouse in any county within Florida;
- Authorizes substitute service on the registered agent, member, or manager of a Limited Liability Company at a virtual office, executive office, or mini suite, if the address provided by the LLC for service of process on the registered agent, member, or manager is a virtual office, executive office, or mini suite;
- Authorizes all process servers to sign return-of-service forms electronically and removes the requirement that the sheriff certify electronic signatures;
- Requires return of service forms to list all pleadings and documents served;
- Authorizes anyone serving process to initial or sign the first page of the process served and requires such person to include his or her identification number, if applicable.

HB 409: Related to the Notarization of Electronic Legal Documents. This bill passed both the House and the Senate and is awaiting the Governor's signature. Once the Governor has approved the bill, it becomes effective January 1, 2020.

Currently, the law prohibits a notary from notarizing a signature if the party executing the document is not in the notary's physical presence at the time of signature. This bill authorizes a notary to remotely observe the signing of a document and notarize it using an online platform.

HB 301: Related to Insurance. This bill passed both the House and the Senate and is awaiting the Governor's signature.

This bill creates Florida Statute 624.1055, providing for the right of contribution among liability insurers for defense costs. A liability insurer who owes a duty to defend an insured and who defends the insured against a claim, suit, or other action has a right of contribution for defense costs against any other liability insurer who owes a duty to defend provided that the contribution may not be sought from any liability insurer for defense costs that are incurred before the liability insurer's receipt of notice of the claim, suit, or other action. Therefore, if more than one liability insurer, including surplus line insurers, have a duty to defend an insured, the insurer(s) that does defend the insured is entitled to contribution from the insurer(s) that does not defend the insured for defense costs.

The bill also provides that the court shall allocate defense costs among liability insurers who owe a duty to defend the insured against the same claim, suit, or other action in accordance with the terms of the liability insurance policies.

The bill also provides that a liability insurer, entitled to contribution from another liability insurer under F.S. 624.1055, may file an action for contribution in a court of competent jurisdiction.

F.S. 624.1055 as created by HB 301, applies to any claim, suit or other action initiated on or after January 1, 2020. However, it does not apply to motor vehicle liability insurance or medical professional liability insurance.

Bills that Failed to Pass the 2019 Legislative Session

Although the following bills did not pass the 2019 legislature, they did grab the attention of the Construction Industry and are therefore worth mentioning:

HB 101/SB 246: Public Construction, Reduction in Florida's Retainage Rate on Public Construction Projects

This bill would have reduced the Florida Retainage Rate on public construction from 10% to a flat rate of 5% throughout the life of the project.

SB 1246/HB 911: Construction Defects

This bill would have repealed the Chapter 558 pre-suit, notice and cure process and replaced it with the post-suit, mandatory, non-binding arbitration in all construction defect cases.

HB 27: Industry De-Regulation

This bill would have made the following industry related changes:

- Elimination of seats on the Construction Industry Licensing Board ("CILB")
- Elimination of seats on the Building Commission
- Allowing for apprentices to use their education component to meet the education requirement for licensing
- Allowing a graduating apprentice to opt out of the testing required for licensure
- Allowing for contractors from other states, if they meet a series of requirements, to have a number of items waived in order to secure a license in Florida.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.

As always, we are pleased to share insights and updates related to legal issues of interest with clients and friends of the Firm. Our records reflect that the recipient of this message is not a European Union "Data Subject" as defined by the General Data Protection Regulation (GDPR), enacted on May 25, 2018. If you are or consider yourself to be a Data Subject under the EU's GDPR, kindly email Jennifer Papantonio at JPapantonio@pecklaw.com right away. The GDPR requires that all European Union Data Subjects provide explicit consent in order to continue to receive our communications.

C O U N S E L T O T H E C O N S T R U C T I O N I N D U S T R Y

NEW YORK, NY • RIVER EDGE, NJ • MIAMI, FL • WASHINGTON, D.C. • LOS ANGELES, CA
OAKLAND, CA • CHICAGO, IL • AUSTIN, TX • DALLAS, TX • HOUSTON, TX

WWW.PECKLAW.COM